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IN THE

Supreme Court of the United States

October Term 1974

No. 74-658

ROHM AND HAAS COMPANY AND ROHM AND HAAS TEXAS INCORPORATED,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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The petitioners, Rohm and Haas Company and Rohm and Hass Texas Incorporated (hereinafter "Rohm and Haas") pray that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the Fifth Circuit rendered on September 9, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, appears at Appendix A, *infra*. The opinion of the trial court, i.e. United States

District Court for the Southern District of Texas, Houston Division, appears at Appendix B, *infra*. Affidavit of John Parrott is attached as Appendix C.

JURISDICTION

The order of the United States Court of Appeals was entered on September 9, 1974. Motion for Rehearing was overruled on October 30, 1974. This petition for certiorari is being filed less than 90 days from the dates aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

United States of America brought suit seeking to enjoin Rohm and Haas from discharging refuse materials from its Houston plant into the Houston ship channel in violation of 33 U.S.C. 407, the Refuse Act. The District Court entered judgment for plaintiff. The United States Court of Appeals has affirmed in part, vacated in part and remanded. The questions arising are:

1. Does §4 of the Federal Water Pollution Control Act Amendments of 1972 authorize the prosecution of Refuse Act suits pending at the time of the enactment of the Federal Water Pollution Control Act Amendments of 1972?
2. Did the District Court err in refusing to follow the standards and guidelines set forth in Sections 301, 304 and 307 of the Federal Water Pollution Control Act Amendments of 1972?
3. Did the District Court err in failing to apply the doctrine of primary jurisdiction?
4. Will affirmance of the District Court's injunction, in the light of subsequent legal developments, effect a denial of constitutional due process?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This application involves the construction of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251 *et seq*, PL92-500; enacted by Congress October 18, 1972.

This appeal also involves the Constitution of the United States, Amendment 14, §1: ". . . Nor shall any State deprive any person of life, liberty or property without due process of law . . ." and Amendment 5.

STATEMENT OF FACTS

The statements of fact contained in the opinion of the Court of Appeals are accurate.

REASONS FOR GRANTING THE WRIT

1. The opinions of the District Court and the Court of Appeals disregard the plain language of the "Savings Provision" of the Federal Water Pollution Control Act.

The plain language of the "Savings Provision" clearly provides that the only type of suit which is "saved" is an action ". . . commenced by . . . any . . . employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of the enactment of this Act . . ." The phrase ". . . under the Federal Water Pollution Control Act . . ." clearly modifies all of the preceding language. Common sense, ordinary rules of grammer, and the philosophy of

Congress as set forth in the Federal Water Pollution Control Act of 1972 clearly support a conclusion that the savings clause should be interpreted to save only actions under the Federal Water Pollution Control Act.

Reference to legislative history is not permissible if the language of the statute is clear. *Thompson v. United States,* 246 U.S. 547 (1918).

Study of all of the legislative history yields conflicting conclusions and thus what Congress did must be judged solely in the light of the statutory language. The report of the Committee on Public Works, H. R. 11896, House Report No. 92-911, March 11, 1972 discusses the savings provision and states that:

> "§4 provides that no actions commenced by or against the administrator in the carrying out of his responsibilities under the Federal Water Pollution Control Act as it presently exists shall abate because of the Amendments to the Federal Water Pollution Control Act in §2 of the legislation."

The Federal Water Pollution Control Act of 1972 creates a sensible, systematic and detailed plan for conquering complex, long-standing problems. The comprehensive and sophisticated regulatory scheme created by the Federal Water Pollution Control Act of 1972 is obviously inconsistent with the simplistic biblical prohibition of the Refuse Act. Some rational method of reconciling this inconsistency must be discovered or the conclusion must be reached that the Refuse Act is, for practical purposes, repealed by implication, with the possible exception of the criminal sanctions imposed by the Refuse Act.

2. The District Court erred in refusing to follow the standards and guidelines set forth in §301, 304 and 307 of the Federal Water Pollution Control Act Amendments of 1972 (33 USCA §1311, 1314 and 1317).

The District Court's order candidly states:

> ". . . This Court is hesitant to attempt to establish measurement standards relating to the harmful effluents discharged by Rohm and Haas into the Houston Ship Channel. . . . This court recognizes that as the problem of discharge of harmful effluents into the Houston Ship Channel receives more and more study and attention, some one governmental agency, either Federal, State, County or City will more than likely establish other and better standards; but, until such is accomplished, this court is certain that it cannot escape its obligation and responsibility in this respect. Parenthetically, this court believes that some one agency could and should be established not only to set standards in these respects but to have the power to seek, through the courts, compliance therewith. The Judges of the various courts, including the Judge of this court, do not possess the technical expertise necessary to wisely establish pollution criteria. . . ."

The trial court, with commendable candor, stated openly during the trial that he would not in his decision, apply the factors which Congress has mandated shall be considered in determining effluent guidelines. (App. 679-680, 863).

§304(b) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C.A. §1314(b)) states that:

> "(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator *shall,*

> after consultation with appropriate Federal and State agencies and other interested persons, publish . . . regulations, providing guidelines for effluent limitations, . . . Such regulations shall . . . (B) Specify factors to be taken into account in determining the control measures and practices to be applicable to point sources. . . . Factors relating to the assessment of best practicable control technology currently available to comply with §§(b)(1) of §301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements) and such other factors as the Administrator deems appropriate; . . ."

There was no testimony before the court to enable the court to balance the cost of achieving the effluent limitations set forth in his order as compared to the benefits to be obtained from such reduction. There was no testimony before the court concerning the non-water quality environmental impact of the changes necessary to effect the effluent limitations prescribed in the court's order.

The Federal Water Pollution Control Act is an admirably comprehensive piece of legislation. It was designed to deal with all facets of recapturing and preserving the biological integrity of the nation's water by creating a web of complex inter-related regulatory programs.

It is not rational or supportable that a decision setting effluent limitations, in the face of this comprehensive declaration of national policy, should fail to take into consideration those factors which Congress has decreed must be considered.

The Moses-like prohibition of the Refuse Act is obviously inconsistent with the comprehensive "web of complex inter-related regulatory programs" created by the Federal Water Pollution Control Act of 1972. If these two inconsistent statutes are to coexist, a rational condition of this coexistence would be to require that any injunctive decree issued under the Refuse Act comply with the expression of national policy setting forth those factors which must be taken into consideration in setting effluent limitations.

The Savings Provision, even if it is construed so as to save causes of action asserted under the Refuse Act, merely provides that suits under the Refuse Act shall not "abate". The Refuse Act grants no authority to establish effluent limitations, and therefore if a court undertakes to establish effluent limitations there would appear to be an obvious obligation to comply with the expression of national policy contained in a major, comprehensive act passed almost contemporaneously with the trial of the case and several months before final entry of judgment.

3. The District Court and the Court of Appeals erred in failing to apply the doctrine of primary jurisdiction.

The trial court's opinion states:

> ". . . This court recognizes that as the problem of discharge of harmful effluents into the Houston Ship Channel receives more and more study and attention, some one governmental agency, either Federal, State, County, or City will more than likely establish other and better standards; but, until such is accomplished, this court is certain that it cannot escape its obligation and responsibility in this respect. . . ."

In reality, the District Court would have better served his responsibility by staying the judicial process until the administrative agency charged with the administration of the Federal Water Pollution Control Act Amendments of 1972 had determined the proper level of effluents for Rohm and Haas to discharge. The facts here clearly fit within the holding and language of Your Honor's opinion in *United States v. Western Pacific Railroad Company*, 352 U.S. 59 (1956) and *Great Northern Railway v. Merchants Elevator*, 259 U.S. 285 (1922).

A holding that where the United States as a plaintiff in a pollution suit seeks the establishment of effluent limitations, reference of the controversy must initially be made to the Environmental Protection Agency is consistent with the Court of Appeals' construction of the savings clause. The Refuse Act does not provide a mechanism, a set of standards, or any authorization for fixing effluent limitations. It does provide for an imposition of criminal sanctions. A rational reconciliation of the Refuse Act and the Federal Water Pollution Control Act of 1972 (assuming arguendo that the Savings Clause does save Refuse Act cases) would be that the Refuse Act is available for the imposition of criminal sanctions, but that where efforts are made to establish effluent limitation guidelines, reference must first be to the Environmental Protection Agency under the Federal Water Pollution Control Act of 1972.

4. Enforcement of the District Court's injunction, even for a limited period of time, deprives petitioners of due process.

This Honorable Court, in one of its finest hours, with reference to a statute which vested in its enforcers an arbitrary and unregulated discretion, said:

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . ." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886).

The effect of the opinions of the District Court and the United States Court of Appeals, taken in combination with the manner in which the regulatory scheme devised by the Federal Water Pollution Control Act Amendments of 1972 has developed since the date of trial, has created a situation in which the United States attorney has been vested with an arbitrary and unregulated discretion, the exercise of which is inconsistent with the principles of due process.

A series of United States government actions, none of which in themselves may have constituted a denial of due process, and all of which can best be understood by a chronological account, have placed Rohm and Haas in a situation where it is victimized by an unconstitutional, arbitrary and unreasonable classification. The series of events are:

1. The United States Congress in 1899 passed the Refuse Act, containing what has now been construed to be an all inclusive, Moses-like prohibition against the discharge of pollutants into navigable waters.
2. For many years thereafter, and in fact until 1970, the United States government, through the Army Corps of Engineers, construed the Refuse Act as applicable only to discharges adversely affecting navigation. See *United States v. Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655 (1973).

3. In 1961 the State of Texas established by statute the Texas Water Pollution Control Board, Art. 7621(d) Vernon's Annotated Texas Civil Statutes. This statute created a State regulatory scheme contemplating and establishing a permit system. Rohm and Haas duly applied for and received a State permit for its discharge.

4. In 1970 the policy of the United States government with reference to the Refuse Act changed, the governmental construction of that statute changed, and efforts were made to abate pollution by use of the Refuse Act, construed as a blanket prohibition against the discharge of effluent material. See House Report No. 92-133, "Enforcement of the Refuse Act of 1899", House Committee on Government Operations, Aug. 14, 1972. As part of this change in national policy and the construction of and enforcement of the Refuse Act, the President of the United States established a formal Refuse Act permit program on December 23, 1970. Executive Order 11574, 35 Federal Register 19,627 (December 25, 1970). Pursuant to this Presidential directive, the Corps of Engineers on April 7, 1971 promulgated regulations implementing the permit program. 33 C.F.R. 209.131. Pursuant to these regulations and this change of policy Rohm and Haas filed a permit application for its Houston plant on June 30, 1971. This permit application has been pending since that date, with no governmental action. In December, 1971 a cloud was cast upon the then existing practice of implementing the Refuse Act by the decision in *Kalur v. Resor*, 335 F. Supp. 1, holding that permits could be issued only upon the filing of environmental impact statements.

5. On July 19, 1971 the United States of America filed this case against Rohm and Haas, seeking

to permanently enjoin the defendant from "permitting or causing the discharge or deposit of refuse matter, directly or indirectly into the Houston Ship Channel; . . ."

6. On October 18, 1972 the Congress of the United States enacted the Federal Water Pollution Control Act of 1972.

7. This cause was tried in November, 1972 and judgment entered in January, 1973.

8. In April, 1974 the Environmental Protection Agency, pursuant to the provisions of the Federal Water Pollution Control Act Amendments of 1972, published guidelines for the organic chemicals manufacturing category, the category governing Rohm and Haas' operation in question.

This series of events has created a situation in which Rohm and Haas has been placed, arbitrarily and unreasonably, in a category separate and distinct from other organic chemical manufacturers who are dischargers into navigable waters in the United States. The only reason why Rohm and Haas finds itself in this uncomfortable position is that it was subjected to a Refuse Act suit before the passage of the Federal Water Pollution Control Act in 1972. Even if it is assumed *arguendo* that the United States government had a valid reason for filing the initial case, it is clear from the affidavit of John Parrott on file with the United States Court of Appeals that the reasons for this discriminatory treatment have been terminated.

The series of events described above has created a situation in which there is in fact an arbitrary, unreasonable distinction between Rohm and Haas and its competing companies with whom it should be classified and

treated equally. This distinction bears no reasonable relationship to the legitimate purposes of either the Refuse Act or the Federal Water Pollution Control Act.

Those organic chemical manufacturers fortunate enough to have avoided suit under the Refuse Act before October, 1972, are entitled to have their effluent limitations set by the Environmental Protection Agency applying the standards and rules established by the Federal Water Pollution Control Act Amendments of 1972 and the published guidelines issued pursuant to that statute. Rohm and Haas, however, not because it is presently an egregious polluter, but merely because it had the bad fortune to be subjected to suit before enactment of the Federal Water Pollution Control Act Amendments of 1972, must, unless it is granted relief or unless the EPA proceeds to act on its application for a permit, comply with effluent limitations which were fixed by a District Court who declined to follow the standards of the Federal Water Pollution Control Act Amendments of 1972 and who did not have access to, because they had not been published, the guidelines applicable to the organic chemical industry which had been published by the Environmental Protection Agency. Several fundamental principles are applicable.

Statutes or governmental arrangements which place within the hands of the enforcing authorities the right to grant permits or licenses on the basis merely of whim or caprice, without the application of clearly defined and recognizable standards, do not meet the requirements of Constitutional due process. See *Appeal of Clements*, 207 N.E.2d 573 (Court of Appeals of Ohio 1965) and *State v. Blanchey*, 75 Wash. 2d 926, 454 P.2d 841 (Cert. Den'd. 396 U.S. 1045).

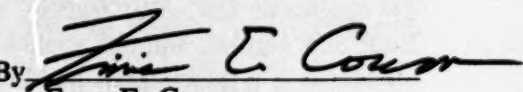
Imposition of restrictions without a *meaningful* hearing is absence of due process. *Hannah v. Larche,* 363 U.S. 420 (1961); *Joint Anti-Facist Refuge Committee v. McGrath,* 341 U.S. 123 (1951) and *Armstrong v. Maizo,* 380 U.S. 545 (1965). While the District Court in the present case patiently and conscientiously heard the evidence, he improperly refused to apply the standards of the applicable law. Any hearing, no matter how conscientious and careful, without application of the proper legal standards is a meaningless hearing.

A deprivation of due process can occur even though the deprivation occurs by virtue of circumstance rather than intentional malice. *Norwalk Core v. Norwalk Development Agency,* 395 F.2d 920 (2d Cir. 1968). Selective enforcement is not, of course, generally speaking a deprivation of due process, but the situation which has been created here is not the result merely of selective enforcement, but is the result of a series of circumstances and governmental actions which have, without cause, placed Rohm and Haas in a category different from that of other organic chemical manufacturers. This classification is the result, not of present conditions, but the result of capricious circumstances and governmental actions and now constitutes an arbitrary, and unreasonable classification.

PRAYER

Rohm and Haas respectfully but urgently prays that its petition for Writ of Certiorari be in all things granted and that this Honorable Court review and reverse the holdings of the Courts below.

BAKER & BOTTS

By 

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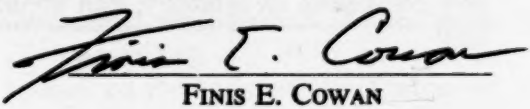
CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing has been mailed, certified mail, return receipt requested, to Mr. Jack Shepherd, Chief Assistant U. S. Attorney, U. S. Attorney's Office, 515 Rusk, Room 1200, Houston, Texas 77002 and to Mr. Robert L. Klarquist, Esq., Department of Justice, Washington, D. C. 20530, on this the 27th day of November, 1974.



FINIS E. COWAN

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

ROHM & HAAS COMPANY and Rohm & Haas of Texas, Incorporated, Defendants-Appellants

No. 73-1727

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Sept. 9, 1974

Government brought continuous discharge pollution action under the Refuse Act against operator of chemical plant. The United States District Court for the Southern District of Texas, John V. Singleton, Jr., J., 353 F.Supp. 993, entered injunctive order setting limitations on discharge of various pollutants into channel by operator and totally enjoined barging of such wastes to sea, and the operator appealed. The Court of Appeals, Roney, Circuit Judge, held that the action, which had been instituted in the name of the United States prior to enactment of Federal Water Pollution Control Act Amendments which provided, inter alia, that there could be no violation of Refuse Act until December 31, 1974 where permit for discharge had been applied for, was within ambit of the amendments' saving clause; that injunctive order would be modified so as not to govern operator's conduct after permit had been issued; and that barging of wastes to sea was outside scope of the Refuse Act.

Affirmed in part, vacated in part and remanded.

1. Navigable Waters Key 35

Barging of wastes to sea for disposal approximately 100 to 125 miles from the coast was outside scope of the Refuse Act. Rivers and Harbors Appropriation Act of 1899, § 9 et seq., 33 U.S.C.A. § 401 et seq.

2. Navigable Waters Key 3

Continuous discharge pollution suit which was instituted under the Refuse Act, prior to enactment of Federal Water Pollution Control Act Amendments, against chemical plant operator which had applied for permit to discharge waste into ship channel was within ambit of savings clause of the amendments which provided that there can be no violation of the Refuse Act until December 31, 1974 where permit for discharge has been applied for but that the amendments should not cause the abatement of any suit commenced prior to enactment of the amendments. Rivers and Harbors Appropriation Act of 1899, § 9 et seq., 33 U.S.C.A. § 401 et seq., Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 402(k), 33 U.S.C.A. §§ 1251 et seq., 1342(k).

3. Navigable Waters Key 3

Reference to "Federal Water Pollution Control Act" in savings clause, providing that no action or proceeding "commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act" shall abate by reason of taking effect of amendments to the Act, relates only to the phrase "in relation to the discharge of his official duties" and does not preclude actions under the Refuse Act from coming within ambit of the "official

capacity" portion of the savings clause. Rivers and Harbors Appropriation Act of 1899, § 9 et seq., 33 U.S.C.A. § 401 et seq.; Federal Water Pollution Control Act Amendments of 1972, §§ et sq., 402(k), 33 U.S.C.A. §§ 1251 et seq., 1342(k).

4. Statutes Key 228

Savings clauses are to be broadly construed.

5. Navigable Waters Key 3

Intent of original authors of Federal Water Pollution Control Act Amendments was not controlling with respect to whether Refuse Act actions pending at time of enactment of the amendments were within ambit of the amendments' savings clause; congressional intent at time of passage was the relevant consideration. Rivers and Harbors Appropriation Act of 1899, § 9 et seq., 33 U.S.C.A. § 401 et seq.; Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 402(k), 33 U.S.C.A. §§ 1251 et seq., 1342(k).

6. Navigable Waters Key 3

Fact that Refuse Act suit, which was commenced prior to enactment of Federal Water Pollution Control Act Amendments, was brought in the name of the United States did not preclude it from being within ambit of savings clause of the amendments applicable to actions brought by "the Administrator or other officer or employee of the United States," where suit was authorized by Assistant Attorney General upon recommendation of Administrator of Environmental Protection Agency and complaint was signed by Chief Assistant United States Atttorney. Rivers and Harbors Appropriation Act of

1899, § 9 et seq., 33 U.S.C.A. § 401 et seq.; Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 402(k), 33 U.S.C.A. §§ 1251 et seq., 1342(k).

7. Administrative Law and Procedure Key 228
Navigable Waters Key 35

United States was not required under doctrine of primary jurisdiction to seek relief from Environmental Protection Agency before proceeding against chemical plant operator under the Refuse Act for injunctive relief from operator's discharge of various pollutants into ship channel pending EPA action on application for permit. Rivers and Harbors Appropriation Act of 1899, § 9 et seq., 33 U.S.C.A. § 401 et seq.

8. Navigable Waters Key 35

Polluter discharging wastes in accordance with terms and conditions of a permit is not in violation of the Refuse Act. Rivers and Harbors Appropriation Act of 1899, § 9 et seq., 33 U.S.C.A. § 401 et seq.; Federal Water Pollution Control Act Amendments of 1972, §402(a)(4), 33 U.S.C.A. § 1342(a)(4).

9. Navigable Waters Key 35

Injunctive order setting certain limitations upon discharge of various pollutants into ship channel by chemical plant operator should have been limited so that it did not govern operator's conduct after issuance of discharge permit for which operator had applied. Rivers and Harbors Appropriation Act of 1899, § 9 et seq., 33 U.S.C.A. § 401 et seq.; Federal Water Pollution Control Act Amendments of 1972, § 402(a)(4), 33 U.S.C.A. § 1342(a)(4).

10. Courts Key 406.6(12)

Absent findings of fact or conclusions of law with respect to issue of whether chemical plant operator could properly barge pollutants to sea, order enjoining such deep sea barging would be vacated for failure to comply with rule requiring findings and conclusions. Fed.Rules Civ. Proc. rule 52(a), 28 U.S.C.A.

11. Appeal and Error Key 170(1)

Argument that order enjoining chemical plant operator from barging pollutants to sea could be supported under the Marine Protection, Research, and Sanctuaries Act would not be considered for the first time on appeal. Marine Protection, Research, and Sanctuaries Act of 1972, §§ 2 et seq., 102, 33 U.S.C.A. §§ 1401 et seq., 1412.

12. Federal Civil Procedure Key 2290

In cases tried without jury, including suits in which permanent injunctions are issued, rule mandates findings of fact and conclusions of law sufficiently detailed and exact to indicate the factual basis for the district court's ultimate conclusion. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

13. Federal Civil Procedure Key 2290

Findings that chemical plant operator discharged refuse matter into navigable water of the United States were sufficient to support conclusion that operator violated Refuse Act. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.; Rivers and Harbors Appropriation Act of 1899, § 9 et seq., 33 U.S.C.A. § 404 et seq.

14. Navigable Waters Key 35

Prohibiting chemical plant operator from discharging

pollutants into ship channel in excess of given amounts expressed in terms of pounds per day was supported by references to harmfulness of pollutants and was in compliance with rule prescribing form and scope of injunctions. Fed.Rules Civ.Proc. rule 65(d), 28 U.S.C.A.

15. Constitutional Law Key 249

Injunctive order determining that chemical plant operator was in violation of the Refuse Act and setting certain limitations upon its discharge of pollutants into ship channel under the Refuse Act did not deny equal protection on theory that other polluters would have their effluent limitations determined under Federal Water Pollution Control Act Amendments, as effect of injunction would not survive issuance of discharge permit for which operator had applied and issuance of such permit would depend upon application of standards of the Federal Water Pollution Control Act Amendments. Rivers and Harbors Appropriation Act of 1899, § 9 et seq., 33 U.S.C.A. § 401 et seq.; Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., 33 U.S.C.A. § 1251 et seq.

Appeal from the United States District Court for the Southern District of Texas.

Before TUTTLE, GEWIN and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This is a continuous discharge pollution case filed by the Government under the 1899 Refuse Act against Rohm

and Haas Company, which has a large chemical manufacturing plant with a single outfall through which its treated waste water goes into the Houston Ship Channel. The District Court entered an injunctive order which set certain limitations upon the discharge by the Company of various pollutants, such as ammonia, chemical oxygen demand, cyanide, chromium, nickel, oil and grease, into the Houston Ship Channel, and totally enjoined the barging of such wastes to sea. 353 F.Supp. 993 (S.D.Tex. 1973). The injunction has been stayed pending this appeal which raises difficult issues as to the relationship between the old Refuse Act and the new Water Pollution Control Act.

On appeal the Company argues (1) that the Federal Water Pollution Control Act Amendments of 1972 prevent prosecution of this Refuse Act suit; (2) that the doctrine of primary jurisdiction should be applied and this case remanded to the Environmental Protection Agency for the initial determination of effluent limitations; (3) that the Refuse Act does not confer jurisdiction over waste disposal on the high seas; (4) that the District Court's order is deficient under Federal Rules of Civil Procedure 52(a) and 65(d); and (5) that even if the Federal Water Pollution Control Act Amendments do not bar this action, they provide the proper legal standard to be applied in establishing effluent limitations for the Company's plant.

[1] Except for modifying the injunction so that it will not override subsequent agency action under the new Act, and striking that portion of the injunction that applies to barging wastes to sea, which we find outside the scope of the Refuse Act, we affirm the action of the District Court. We discuss the arguments of appellant seriatim.

I.

[2] Rohm and Haas argues that it cannot be in violation of the Refuse Act, 33 U.S.C.A. § 407, because it has applied for a permit to discharge wastes into the Houston Ship Channel, and section 402(k) of the Federal Water Pollution Control Act Amendments, 33 U.S.C.A. § 1342 (k) (Supp.1974), specifically provides that "in any case where a permit for discharge has been applied for," there can be no violation of the Refuse Act until December 31, 1974. It contends that on this basis the suit should have been dismissed. A savings clause, however, provides that the amendments, enacted after this suit was filed, but before it was tried, shall not cause abatement of any suit commenced prior to the enactment of the law. The issue for determination is whether the scope of the savings clause includes this kind of suit.[1]

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1. Although the Refuse Act is explicitly preserved by section 511 (a)(2)(B) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. § 1371(a)(2)(B) (Supp. 1974), its role is significantly diminished in the new regulatory structure. Section 402 of the amended FWPCA, 33 U.S.C.A. § 1342 (Supp. 1974), establishes the National Pollutant Discharge Elimination System (NPDES) of permits, which replaces the Refuse Act Permit Program established pursuant to Executive Order No. 11574, 3 C.F.R 292 (1974). No Refuse Act permits are to be issued after the enactment of the Amendments on October 18, 1972. FWPCAA § 402(a)(5). Instead, NPDES permits are deemed to be permits issued under the Refuse Act. *Id.* § 402(a)(4). Refuse Act permit applications pending when FWPCAA became law were converted into NPDES permit applications by subsection 402(a)(5). Where an NPDES permit has been applied for but no final administrative disposition has been made, subsection 402(k) provides that, until December 31, 1974, the discharge in question shall not be a violation of either the amended FWPCA or the Refuse Act (unless the applicant's failure to provide requested information has caused the administrative delay). In this respect Congress departed from the pattern of the Refuse Act Permit Program. Under the RAPP regulations, the pendency of a permit application would not prevent a Refuse Act suit. 33 C.F.R. § 209.131 (d)(4) (1973).

The savings provision provides:

> No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act shall abate by reason of the taking effect of the amendment made by . . . of this Act. . . .

86 Stat. 896, note to 33 U.S.C.A. §1251 (Supp.1974).

[3, 4] The savings clause thus preserves two classes of pending actions brought by or against the Administrator or any other officer or employee of the United States: (1) those actions brought by or against them in their official capacities; and (2) those actions brought by or against them in relation to the discharge of their duties under the old FWPCA. Refuse Act cases fall into the first class. Such a reading of the savings clause is consistent with the rule that savings clauses are to be broadly construed. *See* De La Rama S.S. Co. v. United States, 344 U.S. 386, 389-390, 73 S.Ct. 381, 97 L.Ed. 422 (1953); NLRB v. National Garment Co., 166 F.2d 233, 237 (8th Cir. 1948); Quirk v. United States, 161 F.2d 138, 143 (8th Cir. 1947).

The correctness of the above interpretation of the savings clause is supported by the relevant legislative history. In the course of the debates prior to passage of the 1972 Amendments, several members of Congress expressed concern that section 402(k) might be construed to terminate pending Refuse Act litigation. They were assured by the bill's managers that section 4(a) was intended to and

would save all Refuse Act suits then pending in the courts.[2]

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2. Senator Muskie supplemented his opening remarks with a written statement which dealt, *inter alia*, with the effect of the savings provision.

> The Conferees also agreed that there should be no enforcement action taken for failure to have a permit until December 31, 1974, in order to provide an adequate opportunity for the Administrator to review and issue or not issue permits for the applications that are pending on date of enactment or will be pending as a result of expansion of the program.
>
> Concern has been expressed that the "immunity" provision will cause dismissal of pending enforcement actions under the Refuse Act of 1899. Section 4 provides the following relevant words pertaining to the Refuse Act: "No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity . . . shall abate by reason of the taking effect of the amendment made by section 2 of this Act."
>
> Without any question it was the intent of the Conferees that this provision include enforcement actions brought under the Refuse Act, the Federal Water Pollution Control Act, and any other Acts of Congress.

118 Cong. Rec. S. 16875 (daily ed. Oct. 4, 1972).

Senator Griffin raised the point during the debate.

> MR. GRIFFIN. Mr. President, I take this time for the purpose of establishing a legislative history.
>
> After reviewing the conference report on S. 2770, I became deeply concerned that one provision in the conference agreement might adversely affect a number of pending lawsuits brought under the Refuse Act of 1899.
>
> One such suit is now pending against the Reserve Mining Co. of Silver Bay, Minn., a company which has been dumping 67,000 tons of pollutants daily into Lake Superior.
>
> The provision I refer to is section 402(k) . . . .
>
> I am also aware of section 4 of the bill, a provision to preserve pending Federal suits.
>
> However, when these provisions are read together, it is not altogether clear what effect is intended with respect to pending Federal court suits against polluters violating the Refuse Act of 1899.
>
> If section 402(k) were read as having retroactive effect, then about 170 Federal suits filed against polluters prior to the date of enactment of the bill, including the Reserve case, could be dismissed.
>
> . . . . . .

Rohm and Haas contends that these statements should be disregarded as attempts by certain legislators to subvert

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During the last 2 years there have been some 300 criminal convictions under section 13 of the Refuse Act and over 120 civil actions most of which resulted in the defendants either stopping the dumping or agreeing to institute pollution control programs. On the other hand, it is my understanding there have been only a handful of prosecutions for violation of water quality standards since the Federal Water Pollution Control Act was enacted. In view of this—a fact recognized by the conferees—it is inconceivable that the Senate would want to emasculate the best available enforcement device now available—the Refuse Act—and legislatively dismiss suits pending under it.

Accordingly, Mr. President, it is essential that any possible ambiguity be cleared up so that the legislative history will leave no doubt about the intent of the conferees and the Members of this body.

. . . . . .

MR. GRIFFIN. I wonder if I might address my question to the distinguished manager of the bill on this point.

MR. MUSKIE. Yes, indeed. I appreciate having this point raised by the Senator from Michigan. I wish to put my answer in this form.

Section 4(a) of the conference report is an identical provision to that which appeared in the House bill.

Section 402(k) of the conference report is similar, although not identical, to section 402(l) of the House bill.

No question has even been raised up to this point as to the relationship of these two sections. The gentleman's question is the first indication that anyone has ever considered that there was an ambiguity in the two provisions.

Section 4 provides that I quote the relevant words pertaining to the Refuse Act:

"No suit, action, or other proceeding lawfully commenced by or against the Administrator of any other officer or employee of the United States in his official capacity . . . shall abate by reason of the taking effect of the amendment made by section 2 of this Act."

Without any question it was the intent of the conferees that this provision include enforcement actions brought under the Refuse Act, the Federal Water Pollution Control Act, and any other acts of Congress.

I hope and trust that nothing said on this floor or elsewhere would lead anyone to believe that section 4 is anything but totally clear as to its meaning and intent.

the democratic process of legislation by fabricating a legislative history after failing to obtain statutory language

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MR. GRIFFIN. I thank the manager of the bill. Certainly that does clarify the meaning as to the intent of the conferees, and it would clearly indicate that the suit now pending against the Reserve Mining Co. under the Refuse Act would not be affected by this bill.

MR. MUSKIE. That is my belief.

Id. at S 16882-83.

Senator Hart subsequently stated his reliance on Senator Muskie's explanation.

MR. HART. . . . .

Alarm has been voiced that efforts to prevent environmental damage to Lake Superior involving the discharge of taconite tailings by Reserve Mining Co., will be hindered by this legislation. It is my understanding, however, after the explanation of the Senator from Maine, that the suit now pending against the Reserve Mining Co., under the Refuse Act of 1899 will in no way be affected nor will any of the other counts under the existing Federal Water Pollution Control Act or other law.

Id. at S 16890.

The House of Representatives also considered the relationship between sections 402(k) and 4(a). The following colloquy presented and resolved the potential ambiguity.

MR. DINGELL. Mr. Speaker, I rise in support of this conference report, although I have some misgivings concerning certain features of the report, as I will note in more detail.

. . . . . .

At this point, I would like to direct a question to the chairman of the committee with regard to section 402(k) of the bill and section 4(a) of the bill.

It is my understanding that section 402(k) of the bill would grant to any discharger of waste into our Nation's water total immunity from prosecution under the Federal Water Pollution Control Act and under the Refuse Act until the end of 1974. Of course, to obtain this immunity, the polluter would have to file an application for permit, and that application must still be pending.

I am deeply concerned what effect this provision will have on pending law suits and other administrative actions which EPA has initiated over the past 2 years. In particular, I am concerned about the effect of this provision on the Reserve Mining case. The gentleman knows that I have corresponded with him on this issue in the last few days in the full belief that the gentleman and other members of the conference never intended to halt

consonant with their wishes. The Company points out that every time the savings provision was quoted to demonstrate its applicability to Refuse Act suits, the words "or in relation to the discharge of his official duties under the Federal Water Pollution Control Act" were deleted. The Company also points out that section 4(a) originated in H.R. 11896, the House version of the bill, and passed both

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these cases until the end of 1974. I would, therefore, appreciate it if the gentleman would relieve my mind and those of many citizens of this Nation and the Great Lakes by assuring me that it is the intention of the House conferees that the immunity granted under section 402(k) is applicable solely to dischargers who are not on the date of enactment of this bill being prosecuted by the Government, either civilly, criminally, or administratively, under this law or under the Refuse Act. I understand this to be the case because of the language of section 4(a) of the bill entitled "Savings Provision," and because the bill, in fact, does not repeal the Refuse Act of 1899.

Does the gentleman concur with my statement?

. . . . . .

MR. WRIGHT. Mr. Speaker, section 4(a) of the conference report is an identical provision to that which appeared in the House bill. Section 402(k) of the conference report is similar although not identical, to section 402(l) of the House bill.

No question has ever been raised up to this point as to the relationship of these two sections. The gentleman's question is the first indication that anyone has ever considered that there was an ambiguity in the two provisions.

Section 4 provides and I quote the relevant words pertaining to the Refuse Act:

"No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity . . . shall abate by reason of the taking effect of the amendment made by section 2 of this Act."

Without any question it was the intent of the conferees that this provision include enforcement actions brought under the Refuse Act, the Federal Water Pollution Control Act, and any other acts of Congress.

I hope and trust that nothing said on this floor or elsewhere would lead anyone to believe that section 4 is anything but totally clear as to its meaning and intent.

Id. at H 9123-24 (daily ed. October 4, 1972).

houses after adoption by the House and Senate Conferees without change in language. Rohm and Haas urges that the intent of the House Committee on Public Works, which drafted the savings provision originally, should have special significance in the legislative history. The report accompanying H.R. 11896 by that Committee limited the savings clause to "actions commenced by or against the Administrator in the carrying out of his responsibilities under the Federal Water Pollution Control Act." H.R. Rep.No.92-911, 92d Cong., 2d Sess. 141 (1972).

[5] The intent of the original authors is not controlling. We must search for congressional intent at the time of passage. Although the words of the savings clause did not change after conception, their meaning apparently did as the bill moved through the legislative process. The House Committee's narrow reading of the provision, restricting it to WPCA actions, was abandoned by the Conference Committee. "Section 4 of the House amendment provides that pending suits, actions, and other proceedings are not to abate by reason of the amendments made by this Act." Conf.Rep.No. 92-1236, 92d Cong., 2d Sess. (1972), 1972 U.S.Code Cong. & Admin.News, p. 3829. The bill's managers quoted only so much of the provision as was relevant to whether the savings clause applied to Refuse Act suits. The language omitted, referring to FWPCA duties, was unnecessary to the resolution of the question posed. In any event, no member of the Conference Committee took the floor to dispute the managers' interpretation of the Committee's intent. Finally, it is significant that the Senate Committee on Public Works reported that only one FWPCA enforcement case had reached the courts in the more than twenty years since that Act was passed in 1948. S.Rep. 92-414, 92d Cong., 1st Sess. (1971), 1972 U.S.Code Cong. & Admin.News,

p. 3672. It is unlikely that legislators, aware of the nonexistence of FWPCA actions would have concerned themselves about saving those actions and inconsistently have permitted abatement of numerous cases under the Refuse Act.

Other federal courts have held that the 1972 Amendments had no effect upon pending litigation under the Refuse Act. United States v. Ira S. Bushey & Sons, 363 F.Supp. 110 (D.Vt.), aff'd mem., 487 F.2d 1393 (2d Cir. 1973), cert. denied, ____ U.S. ____, 94 S.Ct. 3182, 41 L.Ed.2d ____ (1974); United States v. United States Steel Corp., 356 F.Supp. 556 (N.D.Ill. 1973); United States v. Consolidation Coal Co., 354 F.Supp. 173 (N.D. W.Va.1973); see United States v. Kennebec Log Driving Co., 356 F.Supp. 344 (D.Me.), vacated and remanded on the merits, 491 F.2d 562 (1st Cir. 1973), cert. denied, ____ U.S. ____, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974).

[6] Rohm and Haas, reading the savings provision narrowly, would limit it to actions brought by "the Administrator or other officer or employee of the United States." The Company perceives this suit as outside the savings clause because it was brought by the United States. The short answer to this contention is that the suit was authorized by the Assistant Attorney General, Lands and Natural Resources Division, and the United States Attorney for the Southern District of Texas, upon the recommendation of the Administrator of the Environmental Protection Agency. The complaint was signed by the Chief Assistant United States Attorney for the Southern District. Each of the above officials is an "officer or employee of the United States." Responsibility to enforce the Refuse Act lies with the Department of Justice and the United States attorneys. 33 U.S.C.A. § 413; see Connecticut Ac-

tion Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 86-88 (2d Cir. 1972). Under these circumstances, this suit brought in the name of the United States is within the ambit of the savings clause.[3] *Cf.* United States v. Burns, 54 F. 351, 355 (C.C.D.W.Va.1893); United States v. Interlake Steel Corp., 297 F.Supp. 912, 914 (N.D.Ill.1969).

II.

[7] Rohm and Haas asserts that the plaintiff should first seek relief from an expert administrative body, the Environmental Protection Agency (EPA), before being allowed to proceed against Rohm and Haas in a judicial proceeding. It would have the Court apply the so-called doctrine of primary jurisdiction: that in cases raising issues of fact not within the conventional experiences of judges, or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should first determine some aspects of the proceeding. United States v. Western Pacific R.R., 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956); Far East Conference v. United States, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952). *See generally* K. Davis, Administrative Law Treatise, §§ 19.01-.09 (1958, Supp. 1970).

This argument fails for several reasons. First, the question in this case is not what standard of discharge EPA

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3. It is noteworthy that Senators Griffin and Hart and Representative Dingell were concerned about the effect of the savings clause on United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972), a civil action brought in part under the Refuse Act in the name of the United States. *See* note 2, *supra*. Ultimately, Reserve Mining's discharges were enjoined without deciding the Refuse Act question. United States v. Reserve Mining Co., _____F.Supp._____, at_____ (D. Minn. 1974), conditionally stayed pending appeal, _____ F.2d_____ (8th Cir. 1974).

may eventually permit, but rather what quantities of industrial wastes, if any, an equity court should permit a Refuse Act violator to discharge pending final EPA action on the Company's application for a permit. *Cf.* United States v. Joseph G. Moretti, Inc., 478 F.2d 418 (5th Cir. 1973).

Second, the scientific, technical, and complex factual issues of the case bear on the kind of equitable relief that should be granted, rather than on whether the defendant is in violation of the Act. Discharges in violation of the Refuse Act may be completely halted by injunction and no reason appears why lesser steps may not be taken. *See* United States v. Crow, Pope & Land Enterprises, Inc., 474 F.2d 200 (5th Cir. 1973); United States v. Kennebee Log Driving Co., 491 F.2d 562, 565 (1st Cir. 1973), cert. denied, ____, U.S. ____, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974); Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972); United States v. Ira S. Bushey & Sons, 363 F.Supp. 110 (D.Vt.), aff'd mem., 487 F.2d 1393 (2d Cir. 1973), cert. denied, ____ U.S. ____, 94 S.Ct. 3182, 41 L.Ed.2d ____ (1974); United States v. Lindsay, 357 F.Supp. 784 (E.D.N.Y.1973); United States v. United States Steel Corp., 356 F.Supp. 556 (N.D.Ill.1973); Natural Resources Defense Council v. Grant, 355 F.Supp. 280 (E.D.N.C.1973); United States v. Consolidation Coal Co., 354 F.Supp. 173 (N.D.W.Va.1973); United States v. Kentland-Elkhorn Coal Corp., 353 F.Supp. 451 (E.D.Ky. 1973); United States v. Asbury Park, 340 F.Supp. 555 (D.N.J.1972); United States v. Armco Steel Corp., 333 F.Supp. 1073 (S.D.Tex.1971); Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc., 329 F.Supp. 339 (E.D. Tenn.1971); United States v. Florida Power & Light Co., 311 F.Supp. 1391 (S.D.Fla.1970); *cf.* Wyandotte Trans-

portation Co. v. United States, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967); United States v. Republic Steel Corp., 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960). The moulding of equitable relief, even in highly technical matters, is the proper concern of the courts.

Third, we agree with the United States that the data involved here is not inherently more complex than evidence routinely considered in antitrust suits, patent actions, and rate-setting adjudications.

Fourth, the agency to which Rohm and Haas would have us turn was very much a part of this litigation. EPA's experts were consulted and testified in detail and at length throughout this proceeding. The trial court was advised of EPA's position on the relevant issues.

Fifth, even under the 1972 Amendments the enforcement provision, FWPCAA § 309, 33 U.S.C.A. § 1319 (Supp.1974), states that the Administrator may bring a civil or criminal action in District Court to enforce the provisions of the Act. Absent from this provision is any indication that violations of the Refuse Act or the FWPCA must be considered in administrative proceedings prior to initiation of judicial action.

[8, 9] Because the issue is what an equity court should do pending EPA action, however, the District Court's order must be modified so as not to govern the Company's conduct after a permit has been issued. A polluter discharging wastes in accordance with the terms and conditions of an NPDES permit is not in violation of the Refuse Act. *See* FWPCAA § 402(a)(4), 33 U.S.C.A. § 1342(a)(4) (Supp.1974). The decree should be effective only as long as Rohm and Haas remains in violation of the Act. In contrast to the regulations imple-

menting the earlier U. S. Army Corps of Engineers Refuse Act Permit Program, the EPA rules governing the National Pollution Discharge Elimination System do not require that the permit include limitations embodied in the resolution of a civil action under the Refuse Act. *Compare* 33 C.F.R. § 209.-131(d)(4) (1973) *with* 40 C.F.R. §§ 125.11, .21-.24, .42 (1973).

We therefore remand to the District Court for appropriate modification consistent with this decision.

III.

Rohm and Haas seeks a reversal of the District Court's injunction from further barging to sea of waste materials, which is contained in the following two lines of the Court order:

Barging to Sea of Untreated Waste and Mother Liquors:

None after the date of this judgment.

Rohm and Haas has been disposing of ammonium sulfate mother liquor, a waste material, in the Gulf of Mexico approximately 100 to 125 miles from the coast of Texas since January 1969.

[10] The Government twice tried to bring the barging issue directly into the case by amending its complaint, but the District Court denied both motions to amend, once before trial and once after trial. Nevertheless, the District Court enjoined Rohm and Haas from further deep sea barging without any comment as to the reason or legal basis for the ruling. In fact, there are no findings of fact or conclusions of law on the barging issue which are required under Federal Rule of Civil Procedure 52(a). Accordingly, the order as to deep sea barging must be vacated in view of the District Court's failure to

comply with Rule 52(a). Lettsome v. United States, 434 F.2d 907 (5th Cir. 1970); Acme Boat Rentals, Inc. v. J. Ray McDermott & Co., 407 F.2d 1324 (5th Cir. 1969); Mladinich v. United States, 371 F.2d 940 (5th Cir. 1967).

The Refuse Act under which this suit was brought applies only to discharges of refuse matter "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C.A. § 407. Until shortly before the passage of the FWPCAA, the U. S. Army Corps of Engineers, charged with administering the Refuse Act, apparently took the position that ocean waters were not covered at all by that Act. *See* 33 C.F.R. § 209.260 (1971). In September 1972, the Corps broadened its interpretation, but only to include ocean waters within the three mile territorial limit.

> The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone 3 geographic (nautical) miles seaward from the coast line. Wider zones are recognized for special regulatory powers, such as those exercised over the Outer Continental Shelf.

33 C.F.R. § 209.260(k)(1) (1973).

The Government concedes the Refuse Act by its terms does not touch upon the barging of waste material to sea. There are no findings of fact which would support the District Court's order under any other theory, such as some kind of federal common law of nuisance or water pollution, the necessary implementation of an effective decree under the Refuse Act, or the interstitial use

of equitable power to protect the environment which is asserted by the Government on authority of Illinois v. Milwaukee, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972), and United States v. Ira S. Bushey & Sons, 346 F.Supp. 145 (D.Vt.1972).

The Government argues that we could support the limitation imposed on Rohm and Haas with respect to deep sea barging under the Marine Protection, Research, and Sanctuaries Act of 1972, which became law on October 23, 1972. Pub.L. No. 92-532, 33 U.S.C.A. § 1401 et seq. (Supp. 1974), as amended, (Supp. June 1974). This legislation regulates the transportation of material for dumping into ocean waters. Section 102, 33 U.S.C.A. § 1412 (Supps. 1974 & June 1974), the Environmental Protection Agency Administrator is authorized to issue permits under certain conditions. The following factors are to be considered: the need for the proposed lumping; its effect on human health and welfare, including economic, esthetic, and recreational values; its effects on fisheries resources, plankton, fish, shellfish, wildlife, shore lines, and beaches; its effects on marine ecosystems; the persistence and permanence of the effects of the dumping; the effect of dumping particular volumes and concentrations of materials; alternate locations and methods of disposal or recycling; and the proposed dumping's effect on alternate uses of oceans.

[11] This argument was not treated by the trial court and we will not consider it here. We will remand the case for such consideration as the District Court deems appropriate. In view of the complex and technical nature of the factors to be evaluated as set forth in section 102, the District Court may well want to consider whether the decision as to ocean dumping should be left initially

to the Environmental Protection Agency under the doctrine of primary jurisdiction.

In any event, we vacate that portion of the injunction prohibiting barging to sea and remand for such further proceedings as the District Court may deem appropriate in the light of our decision.

IV.

Rohm and Haas also argues that the District Court's order, insofar as it establishes limitations on discharges into the Houston Ship Channel, does not comply with Federal Rules of Civil Procedure 52(a) and 65(d).

[12] In cases tried without a jury, Rule 52(a) mandates findings of fact and conclusions of law sufficiently detailed and exact to indicate the factual basis for the District Court's ultimate conclusion. Lettsome v. United States, 434 F.2d 907 (5th Cir. 1970); Acme Boat Rentals, Inc. v. J. Ray McDermott & Co., 407 F.2d 1324 (5th Cir. 1969). Although the rule refers only to the granting or refusing of interlocutory injunctions, the language "all actions tried upon the facts without a jury" encompasses suits in which permanent injunctions are issued. Alberti v. Cruise, 383 F.2d 268 (4th Cir. 1967); Chas. Pfizer & Co. v. Zenith Laboratories, Inc., 339 F.2d 429 (3d Cir. 1964); *see* Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508 (5th Cir. 1969).

[13] Rohm and Haas contends that the individual effluent limitations established by the Court are not supported by findings. This is a Refuse Act suit. The findings of fact requisite for relief are that the Company discharged refuse matter into a navigable water of the United States. These findings the District Court made. They lead

to the legal conclusion that the Company violated the Refuse Act. Rule 52(a) is thus satisfied.

[14] Rule 65(d) prescribes the form and scope of injunctions. The limits established by the Court are unquestionably specific. No discharges are permitted in excess of given amounts of the various pollutants, expressed in terms of pounds per day. The question is whether the District Court adequately stated reasons for the injunction, as is also required by the rule. It is apparent from the Court's references to the harmfulness of the pollutants and to the continuous nature of the discharges that an injunction is necessary to prevent further harm. It has been held that a finding of threatened irreparable injury satisfies the reasons requirement of Rule 65(d). Pennsylvania R.R. v. Transport Workers Union, 278 F.2d 693 (3d Cir. 1960); Ross-Whitney Corp. v. Smith Kline & French Laboratories, 207 F.2d 190 (9th Cir. 1953); Smotherman v. United States, 186 F.2d 676 (10th Cir. 1950); In re Rumsey Mfg. Corp., 9 F.R.D. 93 (W.D. N.Y.), rev'd on other grounds sub. nom. McAvoy v. United States, 178 F.2d 353 (2d Cir. 1949).

V.

Rohm and Haas argues in the alternative that the District Court's injunction, if considered procedurally adequate, must be set aside because the Court failed to apply the proper legal standards which it contends should be those established by the FWPCAA to govern the issuance of NPDES permits. Although the savings clause does not prohibit the Amendments from affecting pending actions, it does not require application of the FWPCAA standards to pending Refuse Act suits.

[15] Rohm and Haas argues, however, that if the FWPCAA standards are not applied in establishing ef-

fluent limitations it will be denied equal protection of the laws, "or perhaps more accurately an equal right to violate the law." United States v. Joseph G. Moretti, Inc., 478 F.2d 418, 431 n. 7 (5th Cir. 1973). The Company points out that essentially all other polluters, including its neighbors on the Houston Ship Channel, will have their effluent limitations determined under the amended FWPCAA while it will not. The number of uses prosecuted by the Justice Department under the Refuse Act negates any contention that discrimination in the form of a vendetta is being practiced against Rohm and Haas alone. The difference between the standards applied to defendants in Refuse Act suits brought before the enactment of FWPCAA and that applied to other polluters is the result of the savings clause. Whenever legislation changes a legal standard but saves pending actions, there is apt to be differing treatment of those otherwise similarly situated. The difference in treatment does not rise to the constitutional level of a denial of equal protection. In any event, the effect of the District Court's decree will not survive the issuance of a permit, which will depend upon the application of FWPCAA standards to Rohm and Haas equally with all other applicants.

Conclusion

The Court's injunction is affirmed as to the discharge into the Houston Ship Channel but remanded for modification to limit the duration of the injunction to that period prior to the proper issuance of a permit, and is vacated and remanded insofar as it enjoins the barging of waste material to sea.

Affirmed in part, vacated in part, and remanded.

APPENDIX B

EXHIBIT 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-792

UNITED STATES OF AMERICA

v.

ROHM AND HAAS COMPANY

(Filed January 31, 1973)

FINAL ORDER

This civil action is filed by the plaintiff to enjoin defendant from discharging refuse materials from its Houston plant into the Houston Ship Channel in violation of 33 U.S.C. 407 [commonly known as the Refuse Act]. The plaintiff urges its claimed remedies under authority of 33 U.S.C. 413. This court has jurisdiction of the subject matter under 28 U.S.C. 1345 and its traditional equity jurisdiction.

It must be stated at the outset that the defendant cannot claim the protection of Section 402(k) of the Federal Water Pollution Control Act of 1972. Section 4 of that Act is a savings provision which defeats any attempt by the defendant to abate these proceedings.

Nor will the defendant be protected under equity concepts because it had applied for a permit from the Chief of Engineers.

It is undisputed that the Houston Ship Channel is a navigable water within the meaning of the relevant act. After reviewing a considerable quantity of expert testimony given in this case, this court concludes that the Rohm and Haas Company's Deer Park plant on the Houston Ship Channel is in violation of the Refuse Act by discharging "refuse matter" within the meaning of 33 U.S.C. 407 in that said plant has been and is discharging effluent wastes through separate outflows on a daily and continuous basis into the waters of the Houston Ship Channel. Said effluent wastes contain significant quantities of ammonia, chromium, cyanide, phenols, zinc, cadmium, iron, maganese, copper, nickel lead sulfides, mercury, silver, fluorides, grease and oil, suspended solids, organic nitrogen, surfactants, acrylic monomers and polymers, alcohols, ethanol, iso-butanol, N-Butanol, COD, BOD, suspended solids, and other materials which remain unidentified. *See United States v. Armco Steel Corp.*, 333 F. Supp. 1973 (S.D. Texas 1971) and cases cited therein. Such a violation is remediable by injunction.

This court is not unmindful of the defendant's own extensive research and investigations in an attempt to reduce its discharge of harmful effluents. It is not within the province of this court to direct or compel any one method of treating the deleterious wastes. Also, this court is hesitant to attempt to establish measurement standards relating to the harmful effluents discharged by Rohm and Haas into the Houston Ship Channel. However during the course of this trial, experts representing both the Government and Rohm and Haas gave testimony in detail

relating to measurement standards in an attempt to aid this court in constructing a workable timetable and to establish such standards. This court recognizes that as the problem of discharge of harmful effluents into the Houston Ship Channel receives more and more study and attention, some one governmental agency, either federal, state, county, or city will more than likely establish other and better standards; but, until such is accomplished, this court is certain that it cannot escape its obligation and responsibility in this respect. Parenthetically, this court believes that some *one* agency could and should be established not only to set standards in these respects but to have the power to seek, through the courts, compliance therewith. The judges of the various courts, including the judge of this court, do not possess the technical expertise necessary to wisely establish pollutant criteria. However, with all of this in mind, the court has concluded that the defendant should be and is hereby permanently enjoined from allowing quantities of the following substances to be placed in the Houston Ship Channel in excess of the amounts set out below on the dates set forth:

AMMONIA

By 4/1/73 no more than 7,563 pounds per day.
By 7/1/73 no more than 5,563 pounds per day.
By 7/1/74 no more than 1,350 pounds per day.
By 12/31/74 no more than 405 pounds per day.

CHEMICAL OXYGEN DEMAND (COD)

By 7/1/73 not to exceed 6,400 pounds per day.
By 12/31/74 not to exceed 2,700 pounds per day.

TOTAL CYANIDE

By 2/1/73 no more than 23 pounds per day, with no more than 2.5 pounds per day to be free cyanide.

TOTAL CHROMIUM

By 4/1/73 no more than 50 pounds per day.
By 12/31/73 no more than 5 pounds per day total chromium, zero hexavalent chromium.

NICKEL

By 7/1/73 no more than 130 pounds per day.
By 12/31/73 no more than 81 pounds per day.

TOTAL SUSPENDED SOLIDS (TSS)

By 7/31/73 no more than 1,250 pounds per day.
By 12/31/73 no more than 1,080 pounds per day.

VOLATIVE SUSPENDED SOLIDS (VSS)

By 2/1/73 no more than 1,000 pounds per day.
By 12/31/73 no more than 800 pounds per day.

BIOCHEMICAL OXYGEN DEMAND (BOD^5)

By 7/1/73 no more than 900 pounds per day.
By 12/31/73 no more than 470 pounds per day.

OIL AND GREASE

After the date of this judgment, no free or floating oil or grease.

BARGING TO SEA OF UNTREATED WASTE AND MOTHER LIQUORS

None after the date of this judgment.

The following standards are included as a part of this order as agreed to by the parties in a pretrial stipulation:

1. The total discharge of mercury as mercury, as analyzed by the cool vapor atomic absorption method, shall not exceed a maximum of .1 pounds per day.

2. The discharge of phenols, as defined and analyzed in *Standard Methods for the Examination of Waters and Waste Waters,* 13th Edition, shall not exceed an average of 1.2 pounds per day during any thirty day period.

3. The discharge of sulfides, as defined and analyzed by *Standard Methods for the Examination of Waters and Waste Waters,* 13th Edition, shall not exceed an average of 5.0 pounds per day during any thirty day period.

4. Defendant's discharge of waste materials by injection into its deep well facility located at Deer Park shall not be increased or altered, and only its ammonium sulfate cooling tower water shall be so injected. The standard by which such increase or alteration shall be measured is defendant's representations of present injection well use as set forth in Government Exhibit 19, containing "Specified Interrogatories and Defendant's Answers Thereto," specifically questions and answers numbered 34 and 35:

"34. State whether the company disposes of any of its effluent by

(a) Deep well disposal.

Ans. (a) Yes.

"35. If the answer to 34(a) or (b) is yes, state with regard to each

* * *

(c) The chemical composition of the waste.

* * *

Ans. (c) Ammonium Sulfate Cooling Tower Water (disposed of by Deep Well Injection).

Typical Composition

Total hardness (as $CaCO_3$)	17.5	mg/L
Sodium, $Na+$	2,603.6	mg/L
Calcium, $Ca++$	7.0	mg/L
Magnesium, $Mg++$	0	
Iron (Total, $Fe++$)	3.0	mg/L
Total Alkalinity ($CaCO_3$)	5,300	mg/L
Chloride, Cl	269.5	mg/L
Sulfate, $SO_4=$	5	mg/L
Carbonate, $CO_3=$	6,466.0	mg/L
Hydroxide, OH—	0	
Sulfide, S=	0	
Chromate, Na_2CrO_4	500	mg/L
Oxygen, O_2	5	mg/L
Total Dissolved Solids (calculated)	9,354.1	mg/L
COD*	25,000	mg/L
NH_3	27,800	mg/L

*COD consists of various alcohols and methacrylate monomers."

Upon each of the dates outlined above, the parties will provide samples for measuring each of the wastes in question to the Environmental Protection Agency, Region VI, Houston Laboratory, and receive their evaluation of the quantities present in the samples The parties will then report to the court if necessary

This court will retain jurisdiction of this cause until the guidelines set out have been complied with.

DONE at Houston, Texas, on this the 21st day of January, 1973.

JOHN V. SINGLETON, JR.
United States District Judge

APPENDIX C

NO. 73-1727

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

ROHM AND HAAS COMPANY AND
ROHM AND HAAS TEXAS INCORPORATED,
Defendants-Appellants

AFFIDAVIT IN SUPPORT OF MOTION FOR STAY OF MANDATE PENDING APPLICATION TO THE SUPREME COURT FOR WRIT OF CERTIORARI

My name is John Parrott and I am a resident of Baytown, Texas. I have a B.S. and M.S. degree in chemical engineering from Georgia Tech. I am Conservation Manager for Rohm and Haas Texas Incorporated. My business address is Rohm and Haas Texas Incorporated, P. O. Box 672, Deer Park, Texas 77536. The purposes of this affidavit are to describe progress made by Rohm and Haas Texas Incorporated (hereinafter "Rohm and Haas") in its efforts to improve its water discharge quality since the trial of this case in the trial court, to compare present Rohm and Haas effluent quality with EPA effluent guidelines and Texas

Water Quality Board requirements, and to relate efforts to obtain a discharge permit from the EPA under the Federal Water Pollution Control Act Amendments of 1972.

I.

Effluent Control Facilities Installed Since Time of Trial

Since the time of trial Rohm and Haas has installed extensive additional water pollution control equipment. Five major water pollution control facilities costing $3,278,000 have been installed during this period, as itemized below:

A. We have constructed and are operating a steam stripping column to remove ammonia. The capital cost of this facility was $805,000 and the annual operating cost is about $750,000. The principal beneficial effect of this stripping column has been to decrease the amount of ammonia in our effluent, as shown in the table below. At the time of trial the ammonia discharge was 9,379 pounds per day. The use of the steam stripper has decreased this level dramatically to 3,480 pounds per day (average over the last ten months). In September, 1974 the Texas Water Quality Board issued and published a Waste Load Allocation for the Houston Ship Channel which indicates that Rohm and Haas by 1977 will be required to achieve an ammonia level in its effluent of 2,429 pounds per day (30 day average). The progress achieved during the last two years indicates strongly that this level will be attained by 1977.

B. A flocculating system has been installed as a tertiary treatment process to remove biological solids from the waste water. This facility consists of a large, multicompartment, agitated tank along with pumps, storage tanks, pipes and instruments. The principal beneficial effect of this facility has been a marked improvement in the total suspended solids level. As the table below indicates, during the period when this case was being tried the total suspended solids level averaged 11,225 pounds per day. This has been dramatically decreased to 2,320 pounds per day. The effluent guidelines, published by the Environmental Protection Agency as required by the Federal Water Pollution Control Act Amendments of 1972, indicate a permissible level for total suspended solids over twice the level already achieved by Rohm and Haas. Specifically, the guidelines contemplate achievement of 5,370 pounds per day of total suspended solids by 1977, and during the first ten months of 1974 the average total suspended solids has been 2,320 pounds per day. The system was developed by Rohm and Haas specifically for the wastewater discharged from its Houston plant, and to our knowledge this system is unique in industrial wastewater treatment. This system, by removing the suspended solids, has also been largely responsible for the substantial reduction in chemical oxygen demand (COD) and biological oxygen demand (BOD). The investment cost for this facility was $678,000.

C. Rohm and Haas has installed a sludge dewatering facility, which operates in conjunction with the flocculating system described under paragraph B

above. This is a large pressure filter, which is a filter press with multiple plates. The purpose of this facility is to reduce the suspended solids removed from the flocculating system to a state of dryness so that it can be placed in a landfill. The investment cost for this facility was approximately $1,225,000. Maintenance costs for this facility have been high at about $300,000 per year.

D. Rohm and Haas has constructed an extensive surface drainage collection and treatment system. This system collects surface water in the plant and routes it to a biological treatment facility, consisting of a compositing and equalization basin and a trickling filter. The investment cost for this facility was about $230,000.

E. A gravity settling tank and auxiliary equipment for the purpose of removing nickel from selected wastewater streams has been installed. This has made it possible to comply with the District Court's order relating to the removal of nickel. The cost of this facility was approximately $340,000.

II.

Additional Action Not Involving Construction of Facilities

Although the Court of Appeals vacated the District Court order requiring the cessation of barging "mother liquor" to sea, Rohm and Haas voluntarily stopped the hauling of mother liquor to sea in 1972.

Additionally, although not compelled to do so by any court order or regulatory action, Rohm and Haas voluntarily stopped the injection of all waste into its deep disposal well in November 1973.

The wastes which were previously disposed of by hauling to sea or injection into the deep well are now either being recycled or disposed of in Rohm and Haas' expanded and improved waste treatment facilities.

Rohm and Haas has also eliminated the use of chromate corrosion inhibitors in two of the plant cooling towers, and is currently installing equipment and controls in other cooling towers to permit the use of non-chromate treatments. A substantial reduction in chromium levels in the effluent has been achieved, as tabulated below.

III.

Continuing Technical Studies by Rohm and Haas Employees and Consultants

Since August 1974, Associated Water and Air Resources Engineering, Inc. (AWARE) of Nashville, Tennessee has had a team of four technical people in our plant studying ways to expand and/or improve our waste water treatment plant. Rohm and Haas has committed $90,000 for these comprehensive studies by AWARE, and it is contemplated that their studies will be completed by March 1, 1975.

Rohm and Haas, since the time of trial has continually employed the equivalent of ten full time technical people on pollution abatement and improvement efforts, not including those persons who actually operate and maintain the pollution control facilities.

IV.

Tabular Compilation of Improvement Since Trial

In the table below there are four columns. The first column itemizes the major pollutants contained in the

Rohm and Haas effluent. The second column entitled "Fourth Quarter 1972" is a tabulation on a pounds-per-day basis of the average pollutants in the effluent at the time of trial. The third column is a tabulation of average results for the first ten months of 1974, and the last column shows the effluent limitations which Rohm and Haas believes will be included in a permit issued by the Environmental Protection Agency pursuant to the Federal Water Pollution Control Act Amendments of 1972 (on the basis of guidelines published by the Environmental Protection Agency in April, 1974 and by the Texas Water Quality Board in September, 1974.)

Pollutant	Fourth Quarter 1972 (lbs/day)	First Ten Months 1974 (lbs/day)	Permit Effluent Limitations (lbs/day)
Chemical Oxygen Demand (COD)	19,935	11,360	121,563
Biological Oxygen Demand (BOD)	4,305	2,350	3,342
Total Suspended Solids (TSS)	11,225	2,320	5,370
Volatile Suspended Solids (VSS)	5,808	1,290	—
Ammonia	9,379	3,480	2,429
Total Cyanide	33	45	—
Nickel	89	50	—
Total Chromium	about 60	16	—

It should be noted that this improvement has taken place during a period when several plant expansions have occurred.

At the time of trial extensive experiments were conducted to determine the toxicity of the Rohm and Haas waste water to fish life. At that time, Rohm and Haas' undiluted effluent would not support fish life for any period of time. Experiments done in June, 1974, showed that at that time Rohm and Haas' undiluted effluent supported fish life for greater than four days. This dramatic improvement in the toxicity of the effluent is consistent with the reductions in pollutant levels tabulated above.

V.

Efforts to Facilitate Issuance of EPA Permit

I am not a lawyer, but my position requires me to become familiar with the various statutes and regulations applicable to our efforts to improve our water quality. It is my understanding that § 402(k) of the Federal Water Pollution Control Act Amendments of 1972 provides in effect that dischargers cannot be prosecuted before December 31, 1974 so long as an application for a permit is pending. Rohm and Haas has had an application pending for a permit since June, 1971. In March, 1974 the office of the Administrator of the Environmental Protection Agency published a document entitled "A Statement of Policy for Implementing the Requirements of the 1972 Federal Water Pollution Control Act Amendments". On page 33 of this official government publication appears the following language:

> "The expeditious issuance of permits is a critical priority in the conduct of the strategy. As a general goal, EPA and State efforts should be directed at getting permits issued to all dischargers in all segments prior to December 31, 1974. . . ."

In view of this background I have felt confident that the EPA's issuance of a permit was imminent, and it is my fervent hope that this is still the case.

After publication of the opinion of the Court of Appeals, Rohm and Haas intensified its efforts to encourage the issuance of a permit and pursuant to these efforts has directed the attached letter of September 20, 1974 to Mr. Jack Shepherd, Esquire, Chief Assistant United States Attorney, Department of Justice, in Houston, Texas, the attorney primarily in charge of this litigation, and has also directed to Mr. Shepherd a letter of October 3, 1974 along with an enclosure explaining how the effluent limitations which Rohm and Haas believes will be included in its permit were calculated under the published guidelines of the Environmental Protection Agency. In addition, on Tuesday morning, November 5, Mr. Joe Barolak, President of Rohm and Haas Texas Incorporated and the undersigned and our attorneys met briefly with Judge John H. Singleton and later in more detail with Mr. Jack Shepherd to discuss steps which might be taken to expedite the issuance of a permit. Full explanation was made to Mr. Shepherd of the improvements which have been effected in the last two calendar years, since the date of trial, and Mr. Barolak, the undersigned, and our attorneys, urgently requested Mr. Shepherd to cooperate in seeking immediate action from the Environmental Protection Agency in connection with the issuance of a permit. Mr. Shepherd indicated that he would communicate with other responsible officials within the United States government and advise Rohm and Haas.

Rohm and Haas is willing, and has been willing, to furnish any information and to submit to any inspections

or examinations or auditing to expedite the issuance of a permit.

/s/ JOHN PARROTT
JOHN PARROTT

THE STATE OF TEXAS §
COUNTY OF HARRIS §

John Parrott, being duly sworn, states that he is the person whose name is subscribed to the foregoing instrument and all of the statements of fact and expressions of opinion contained in the above and foregoing affidavits are to the best of his information and belief true and correct.

/s/ JOHN PARROTT
JOHN PARROTT

SWORN TO AND SUBSCRIBED BEFORE ME this the 27th day of November, 1974.

PATRICIA ANN RUSH
Notary Public in and for
Harris County, Texas

G-20,200 September 20, 1974

Jack Shepherd, Esq.
Chief Assistant U. S. Attorney
U. S. Attorney's Office
Department of Justice
P. O. Box 61120
Houston, Texas 77002

Re: United States of America v.
Rohm and Haas Company, et al.

Dear Mr. Shepherd:

I called you on September 10, 1974 to discuss the possibility of settling the Government's suit against Rohm and Haas without further litigation. You requested that I set forth in writing our proposal for resolving this matter and that you would submit this to the Environmental Protection Agency and arrange a meeting of all parties in Houston. This letter is being sent to you in response to that request.

Before setting forth the specific proposal of Rohm and Haas, I believe that it would be worthwhile to review the present status of the suit as we now view it. Although the Fifth Circuit Court of Appeals in its opinion of September 9, 1974 upheld your enforcement of the Refuse Act, the injunction issued by Judge Singleton was modified so that it would terminate when the Company obtained a NPDES permit under the Federal Water Pollution Control Act (FWPCA). As the Court stated at pages 7576 of its opinion, "A polluter discharging waste in accordance with the terms and conditions of a NPDES permit is not in violation of the Refuse Act."

It is our understanding that the Environmental Protection Agency is seeking to issue as many NPDES permits as possible by December 31, 1974. According to the EPA's Water Quality Strategy Paper of March 15, 1974, top priority is given to applications of major dischargers, especially those discharging into streams, such as the Houston Ship Channel, where water quality standards are

not being attained at this time. It would certainly seem that under normal circumstances the EPA would give top priority to the NPDES permit application of the Rohm and Haas Houston plant. With the issuance of the Fifth Circuit's opinion, there is now no reason for the EPA to withhold action on the application for the Rohm and Haas Houston plant. Accordingly, a NPDES permit should be issued for the Rohm and Haas Houston plant by the end of this calendar year, if not earlier.

A NPDES permit issued to Rohm and Haas will, in the words of the Court, "depend upon the application of the FWPCA standards to Rohm and Haas equally with all other applicants." (Op. p. 7581). In other words, the Rohm and Haas Houston plant is to be treated in the same manner as other plants across the country producing similar products, and on the same basis as those plants discharging into the Houston Ship Channel with respect to waste load allocations. Under the FWPCA, the effluent limitations in NPDES permit are to be based on one of the following sets of limitations or standards:

> (1) effluent limitations under Section 301 of the FWPCA which require the application of the best practicable control technology currently available (BPCTCA) by 1977 and the best available technology economically achievable (BATEA) by 1983; or
>
> (2) water quality related effluent limitations under Section 301(b)(1)(C) or Section 302(a).

The Act contemplates that each discharge will achieve as a minimum the Section 301 effluent limitations. If the water quality standards for a body of water into which a company is discharging are not being met, more stringent water quality related effluent limitations will be imposed so that the water quality standards can be attained. However, the permit effluent limitations for 1977 are to be no more restrictive than Section 301 BATEA limitations

without a Section 302 hearing where social and economic costs and benefits and the availability of technology are to be considered. See page 32 of EPA's Water Quality Strategy Paper of March 15, 1974.

On April 25, 1974, Section 301 effluent limitations for the organic chemicals manufacturing category which covers in substantial part the operations at the Rohm and Haas Houston plant were promulgated by the Environmental Protection Agency at 39 Federal Register 14676 *et seq*. Effluent limitations requiring the application of the best practical control technology currently available (BPCTCA) were established for BOD and TSS (1977 standards) and those requiring the application of the best available technology economically achievable (BATEA) were established for BOD, TSS and COD (1983 standards).

However, in view of the fact that the Houston Ship Channel is not meeting water quality standards established for that body of water, the Texas Water Quality Board pursuant to Section 303(e) of the BWPCA and 40 C.F.R. Parts 130-131 has made a waste load evaluation for the Houston Ship Channel to determine water quality related effluent limitations. This evaluation involves a determination of the assimilative capacity of the Houston Ship Channel in terms of a total maximum daily load of BOD and ammonia nitrogen and then an allocation of the waste load on an equitable basis with respect to each discharger. Following hearings at Baytown on August 12-14, the TWQB Hearing Commission Report dated September 17, 1974 was issued setting forth revised load allocations which will be presented for approval by the TWQB at its monthly meeting on September 25, 1974. A copy of this Hearing Commission Report is enclosed. You will note that the report indicates that a representative of the EPA Dallas office was present at the Baytown hearings. This EPA representative endorsed the action of the TWQB in developing waste load allocations.

Based upon the Section 301 and water quality limited effluent limitations discussed above, we have set forth below the effluent limitations which Rohm and Haas believes should be incorporated into any NPDES permit for its Houston plant. Pursuant to the provisions of the FWPCA, these effluent limitations are to be achieved by July 1, 1977.

Parameter	Court Effluent Limitations lbs/day 30 day avg.	Proposed NPDES Effluent Limitations lbs/day 30 day avg.	Comments
BOD	470	3,342	Based on TWQB waste load allocation
Ammonia	405	2,429	Based on TWQB waste load allocation for ammonia nitrogen of 2,000 lbs/day
TSS	1,080	5,371	Section 301 effluent limitation (BPCTCA)
COD	2,700	121,562	Section 301 effluent limitation (BATEA is used since there is no BPCTCA number)

As is apparent from the above table, there is considerable disparity between the effluent limitations ordered by Judge Singleton and the effluent limitations which the EPA is required to incorporate in a NPDES permit for the Rohm and Haas Houston plant. In view of this disparity and the EPA's stated policy of issuing all NPDES permits for dischargers like the Rohm and Haas Houston plant by December 31, 1974, we believe that it would be unreasonable and grossly inequitable for the Court's order

to be enforced against Rohm and Haas pending the issuance of a NPDES permit incorporating the above listed effluent limitations. In fact, it may be possible that the EPA could expedite administrative proceedings so that a permit could be issued prior to the effectiveness of the Court's order.

We believe that it would be profitable to discuss this matter with representatives of the EPA before resorting to further litigation. At any meeting with you and representatives of the EPA, we will be ready to discuss the calculations used to determine the above effluent limitations.

As I indicated to you by phone, I have obtained a fourteen-day extension of the time by which we can file a petition for rehearing (until October 7, 1974). It is hoped that an early meeting can be arranged so that this matter can be fully discussed and resolved before that date. If the matter cannot be resolved by that time, we will be forced to file a petition for rehearing as we believe that we have a strong legal and equitable position requiring modification of Judge Singleton's order.

Please advise me if I can provide you with any further information concerning our proposal. I look forward to hearing from you concerning a date for an early meeting with you and representatives of the EPA.

Very truly yours,

Larry B. Feldcamp

LBF:96

G-20,300 October 3, 1974

Jack Shepherd, Esq.
Chief Assistant U.S. Attorney
U.S. Attorneys Office
Department of Justice
P. O. Box 61120
Houston, Texas 77002

Re: United States of America v. Rohm and Haas Company et al

Dear Mr. Shepherd:

In accordance with my recent telephone conversations with you, I am enclosing a seven page document which explains how the effluent limitations set forth on page four of my letter to you of September 20, 1974 were calculated. I believe that this document is self-explanatory but if you have any questions please do not hesitate to contact us.

We look forward to hearing from you concerning a time and place for a meeting to discuss the matters presented in our letter of September 20, 1974.

Very truly yours,

Larry B. Feldcamp

LBF:56
Enclosure

ASSIGNMENT OF PRODUCTS PRODUCED AT ROHM AND HAAS HOUSTON PLANT TO EPA EFFLUENT GUIDELINE SUBCATEGORIES

Subcategory A:

Octyl and Nonyl Phenol (O/N Phenols), Triton, oil additives. Contact between water and these products is minimal and there is no water used as a reactant or formed as a reactant by-product. This is consistent with the definition of subcategory "A" on page 1 of the April, 1974 Development Document. Final subcategory A guidelines of April 25, 1974 were used.

Subcategory B1:

Methanol is listed in subcategory B1. Final sub-category B1 guidelines of April 25, 1974 were used.

Subcategory B2:

Acetylene is listed in subcategory B2. Final subcategory B2 guidelines of April 25, 1974 were used.

Subcategory C1:

Ammonium Sulfate (AS) is manufactured from ammonia and a waste sulfuric acid stream containing organics. The reaction involves neutralization and crystalization from an aqueous liquid phase system. This fits the definition of subcategory C (Page 1 of the April Development Document). In the absence of a more definite guideline, the lowest level, C1, was chosen from the final guidelines of April 25, 1974.

Subcategory C4:

Acrylates, methyl methacrylate (MMA), methacrylic

acid (MAA), higher methycrylic esters (H esters), butyl methacrylate (BMA).

Acrylates are a listed C4 process. Though our process is not identical to the surveyed process, raw materials and products are common and the C4 subcategory of the April 25, 1974 final guidelines was used.

MMA is a listed C4 process and the final April 25, 1974 guidelines for subcategory C4 were used.

MAA, H esters, and BMA are manufactured via processes similar to MMA, but using water or higher alcohols instead of methanol. They were therefore placed in subcategory C4 and the final April 25, 1974 guidelines for subcategory C4 were used.

Subcategory C6:

Hydrogen Cyanide (HCN) is not listed in either Phase I or Phase II guidelines. However, the HCN process closely resembles Acrylonitrile as described on page 105 of the Draft Development Document for Phase II. Methane is used instead of propylene as a reactant and the product purification steps shown are not used. However, the same wastewater streams are present. Subcategory C6 as listed on page 7 and 9 of the Draft Development Document for Phase II was used for the HCN process:

Subcategory D:

Alkyl Amines

These are small volume batch and semicontinuous products using aqueous catalyst and neutralization systems. Subcategory D, batch and semicontinuous process

guidelines, as proposed in the Federal Register December 17, 1973 were used as no final guidelines have been published.

Other Products Not Categorized

No credit has been claimed in the attached tables for the following production units at the Rohm and Haas Houston plant.

	Plant Capacity 1000 Lbs/Day
Oxygen	800
Ammonia	300
Sulfuric Acid	3,500
Carbon Monoxide	—

BASIC DOCUMENTS

1. Proposed effluent guidelines for the organic chemicals manufacturing point source category, 38 Federal Register 34708, December 17, 1973.

2. Final effluent guidelines for the organic chemical manufacturing point source category, 39 Federal Register 14676, April 25, 1974, as amended at 39 Federal Register 20591, June, 1974.

3. Development document for the major organic products segment of the organic chemicals manufacturing point source category, April, 1974. EPA-440/1-74-009-A.

4. Draft Development Document for Organic Chemicals Industry Phase II. Prepared by R. F. Weston, Inc. for EPA. February, 1974.

Rohm and Haas Texas Incorporated

Houston Plant

Effluent Guidelines and Limitations

Lbs COD/Day

(30 Day Average)

Products specifically covered by EPA subcategory

Product	EPA Subcategory	EPA Guideline for BATEA (lbs COD/ 1000 lbs of Product)	Plant Capacity (1000 Lbs/Day)	BATEA Limitation (Lbs COD/Day)
Methanol	B1	0.58	460	267
Acetylene	B2	0.95	200	190
Acrylates	C4	28.26	1,300	36,738
MMA	C4	28.26	1,800	50,868
(Subtotal)				(80,063)

Products where the EPA subcategory is inferred

O/N Phenols	A	0.045	90	4
Tritons	A	0.045	300	13
Oil Additives	A	0.045	266	12
AS	C1	0.37	800	296
MAA	C4	28.26	202	5709
Higher Esters	C4	28.26	202	5709
BMA	C4	28.26	181	5115
HCN	C6	19.6	670	13132
JM-T	D	65	7	455
81-R	D	65	40	2600
Amines	D	65	7	455
(Subtotal)				(33500)

Total BATEA Lbs COD/Day 121563

Rohm and Haas Texas Incorporated
Houston Plant

Effluent Guidelines and Limitations

Lbs BOD_5/Day

(30 Day Average)

Products specifically covered by EPA subcategory.

Product	EPA Sub-Category	EPA Guidelines for BPCTCA (lbs BOD_5/1000 lbs Product)	Plant Capacity (1000 Lbs/Day)	BPCTCA Limitation (Lbs BOD_5/Day)	EPA Guideline for BATEA (lbs BOD_5/ 1000 lbs Product)	BATEA Limitation (Lbs BOD_5/Day
Methanol	B1	.058	460	27	.025	11
Acetylene	B2	.42	200	84	.18	36
Acrylates	C4	1.37	1,300	1,781	.35	455
MMA	C4	1.37	1,800	2,466	.35	630
(Subtotal)				(4,358)		(1,132)

Products where the EPA subcategory is inferred

O/N Phenols	A	.02	90	2	.0085	1
Tritons	A	.02	300	6	.0085	3
Oil Additives	A	.02	266	5	.0085	2
AS	C1	.12	800	96	.053	42
MAA	C4	1.37	202	277	.35	71
Higher Esters	C4	1.37	202	277	.35	71
BMA	C4	1.37	181	248	.35	63
HCN	C6	5.74	670	3,846	.574	385
JM-T	D	9	7	63	.4	3
Amines	D	9	40	360	.4	16
81-R	D	9	7	63	.4	3
(Subtotal)				(5,243)		(660)

Total lbs BOD_5/day	9,601 (BPCTCA)	1972 (BATEA)

Rohm and Haas Texas Incorporated

Houston Plant

Effluent Guidelines and Limitations

Lbs TSS/Day

(30 Day Average)

Products specifically covered by EPA subcategory

Product	EPA Sub-Category	EPA Guidelines for BPCTCA (lbs TSS/1000 lbs Product)	Plant Capacity (1000 Lbs/Day)	BPCTCA Limitation (Lbs TSS/Day)	EPA Guideline for BATEA (lbs TSS/ 1000 lbs Product)	BATEA Limitation (Lbs TSS/Day)
Methanol	B1	.088	460	40	.040	18
Acetylene	B2	.64	200	128	.29	58
Acrylates	C4	1.25	1,300	1,625	.57	741
MMA	C4	1.25	1,800	2,250	.57	1,026
(Subtotal)				(4,043)		(1,843)

Products where the EPA subcategory is inferred

O/N Phenols	A	.03	90	3	.013	1
Tritons	A	.03	300	9	.013	4
Oil Additives	A	.03	266	8	.013	3
AS	C1	.19	800	152	.085	68
MAA	C4	1.25	202	252	.57	115
Higher Esters	C4	1.25	202	252	.57	115
BMA	C4	1.25	181	226	.57	103
HCN	C6	-	670	-	-	-
JM-T	D	7.88	7	55	1.30	9
Amines	D	7.88	40	315	1.30	52
81-R	D	7.88	7	55	1.30	9
(Subtotal)				(1327)		(479)

Total lbs TSS/day	5370 (BPCTCA)	2322 (BATEA)

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-658

ROHM AND HAAS COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners' large chemical plant was discharging chemical waste products into the Houston Ship Channel. Since petitioners had not received a permit as required by Section 13 of the River and Harbor Act of 1899 (Refuse Act), 33 U.S.C. 407, the United States instituted this suit on July 19, 1971, alleging a violation of the Refuse Act and requesting injunctive relief. After a lengthy trial, the district court determined that petitioners' operations violated the Act, and it entered an order permanently enjoining petitioners from exceeding certain maximum effluent limitations and from barging certain waste materials to sea (Pet. App. B, pp. 39-44). The effluent limitations were based upon the expert testimony offered by both parties at trial (see Pet. App. B, pp. 40-41).

The court of appeals affirmed the district court's order setting maximum effluent limitations but remanded for modification of the injunction to limit its duration to the period preceding the issuance to petitioners of a permit (Pet. App. A, pp. 15-33, 36-38). The court also vacated the district court's order with respect to the barging of waste materials to sea and remanded for further consideration of that issue (Pet. App. A, pp. 33-36, 38).

1. Petitioners contend (Pet. 3-4) that abatement of this suit was required by Section 402(k) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1342(k), which provides that prior to December 31, 1974, discharges of effluents by a person who has applied for a permit under that provision shall not be in violation of the Refuse Act. However, as the court of appeals recognized (Pet. App. A, pp. 22-30), the 1972 Amendments contain a savings clause that specifically permits the continued prosecution of suits, such as this, that were commenced prior to the date of enactment of those Amendments.

The savings clause, Section 4(a) of the 1972 Amendments, 86 Stat. 896-897, "preserves two classes of pending actions brought by or against the Administrator or any other officer or employee of the United States: (1) those actions [including Refuse Act cases] brought by or against them in their official capacities; and (2) those actions brought by or against them in relation to the discharge of their duties under the old [Federal Water Pollution Control Act]" (Pet. App. A, p. 23). Petitioners' contention that the savings clause does not apply to suits brought under the Refuse Act has been uni-

formly rejected by the lower federal courts (see Pet. App. A, p. 29) and is contrary to the legislative history (see Pet. App. A, pp. 23-29).[1]

2. Petitioners further argue (Pet. 5-7) that the district court, in setting maximum effluent limitations, should have explicitly taken into consideration the factors required to be followed by the Environmental Protection Agency in setting guidelines pursuant to Sections 301, 304, and 307 of the 1972 Amendments. However, as petitioners apparently recognize, there is no statutory requirement that those factors be considered explicitly in framing equitable relief under the Refuse Act. Nor is there any showing here that the district court abused its discretion in setting the effluent limitations. Since "[d]ischarges in violation of the Refuse Act may be completely halted by injunction" (Pet. App. A, p. 31), it was not unreasonable for the court to impose less of a restriction upon petitioners' discharges.[2]

3. Petitioners' final contention (Pet. 8-13) is that this suit has resulted in discriminatory enforcement of water pollution standards. According to petitioners, few operators of chemical plants were sued under the Refuse Act prior to enactment of the 1972 Amendments and, as a consequence, the district court's injunction adversely affected petitioners' competitive position. This contention was correctly rejected by the court of appeals (Pet. App. A, pp. 37-38):

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[1]Moreover, the issue now is of little continuing importance because the statutory suspension against the filing of new suits under the Refuse Act terminated on December 31, 1974. See Section 402(k) of the 1972 Amendments.

[2]Petitioners' related contention (Pet. 7-8) that the district court should have abstained from decision pending the grant or denial by the Environmental Protection Agency of petitioners' requested permit, is contrary to the evident intent of the 1972 Amendments' savings clause. See pp. 2-3, *supra*. No statute required the district court to abstain from decision, nor was it an abuse of discretion for the court to refuse to do so.

> [Petitioners argue,] however, that if the FWPCAA standards are not applied in establishing effluent limitations [they] will be denied equal protection of the laws, "or perhaps more accurately an equal right to violate the law." * * * The number of uses prosecuted by the Justice Department under the Refuse Act negates any contention that discrimination in the form of a vendetta is being practiced against [petitioners] alone. The difference between the standards applied to defendants in Refuse Act suits brought before the enforcement of FWPCAA and that applied to other polluters is the result of the savings clause. Whenever legislation changes a legal standard but saves pending actions, there is apt to be differing treatment of those otherwise similarly situated. The difference in treatment does not rise to the constitutional level of a denial of equal protection. In any event, the effect of the District Court's decree will not survive the issuance of a permit, which will depend upon the application of FWPCAA standards to [petitioners] equally with all other applicants.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.